

BEFORE THE  
GOVERNING BOARD OF THE  
BLACK OAK MINE UNIFIED SCHOOL DISTRICT  
STATE OF CALIFORNIA

In the Matter of the Non-Reemployment of  
Certificated Employees (Accusation)  
Against:

OAH No. 2012030779

SHARON ARSENITH  
TAMZIN ELLSWORTH  
SCOTT GILLILAND  
BONNI KLEMP-SORBER  
DENISE MAIMONE  
AMY MCCOMB  
RHONDA PHILLIPS  
FRANCES RAGLE  
ANGELA SCHROEDER  
CHANTALLE SHUCK  
BRENDAN STASIK  
ZADY WIRTH

Respondents.

**PROPOSED DECISION**

Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 18, 2012, in Georgetown California.

Kristen D. Lindgren, Attorney at Law, represented the Black Oak Mine Unified School District (District).

Andrea Price, Attorney at Law, represented all respondents except Denise Maimone and Brendan Stasik.

Denise Maimone represented herself.

Brendan Stasik filed a Request for Hearing and a Notice of Defense but did not appear at the hearing.

Evidence was received and the record remained open to allow the parties to submit written briefs. The District's post hearing and reply briefs were duly filed and were marked

as Exhibits 14 and 15 respectively. Respondents' post hearing and reply briefs were duly filed and were marked as Exhibits E and F respectively. The matter was submitted and the record was closed on April 29, 2012.

## FINDINGS

1. Robert Williams Ed. D. is the Superintendent of the District. His actions and the actions of the Governing Board were taken in their official capacities.

2. On March 8, 2012, at a regular meeting of the District's Board of Trustees (Board), the Superintendent recommended to the Board that 19.9 full-time equivalent (FTE) of certificated services would not be required for the next school year. The Superintendent stated the reasons for this recommendation and also recommended that the employees affected by the discontinuance of these services be given notice that their services would not be required for the 2012-2013 school year.

3. On March 8, 2012, the Board adopted Resolution No. 2012-5 (Resolution), providing for the reduction or elimination of the following particular kinds of services (PKS) for the 2012/2013 school year:

Service	Grade Level	Full Time Equivalent
Elementary Education	K-6	13.8
English	7-12	2.0
Foreign Language – German	9-12	0.4
Math	7-12	1.0
Physical Education	7-12	1.8
Science	9-12	0.4
Special Education – Mild/Moderate	9-12	0.5
<b>District Total</b>		19.9

4. The Resolution recited that the Board had considered anticipated certificated employee attrition (resignation, retirements, non-reelections, temporary teacher releases, etc.)

and that nevertheless, it was still necessary to terminate certificated full-time equivalent positions.

5. The Resolution recited that it would be “necessary to retain the services of certificated employees, regardless of seniority, who possess qualifications and competencies needed in the projected educational program for the 2012/2013 school year which are not possessed by more senior employees thereby subject to layoff. This requirement includes, but is not limited to, the following qualifications and competencies: Teacher in Special Program: American River Charter School.”

6. The Resolution directed the Superintendent, or his designee, to send notice(s) of recommendation of non-reemployment pursuant to Sections 44949 and 44955 of the California Education Code to any employee whose services would be terminated by virtue of the PKS reductions and eliminations.

7. On March 9, 2012, the District served on respondents a written “Notice of Recommendation That Services Will Not Be Required For The 2012/2013 School Year” (Preliminary Notice). The Preliminary Notice advised that the Board had passed a Resolution reducing or discontinuing particular kinds of services which reduced the certificated staff by 19.9 FTE certificated positions. The Preliminary Notice stated that pursuant to Education Code sections 44949 and 44955, respondent was advised that his/her services would not be required.

8. Respondents timely filed Requests for Hearing.

9. The Superintendent made and filed an Accusation against respondents. The Accusation with required accompanying documents and a blank Notice of Defense was timely served on respondents.

10. Respondents timely filed Notices of Defense to the Accusation.

### **Stipulations at Hearing**

11. The parties stipulated to the following changes to seniority dates (first date of paid service with District):

Zady Wirth’s seniority date is changed from 9/16/05 to 9/8/05.

Rhonda Phillips’ seniority date is changed from 1/8/07 to 11/27/06.

Tamzin Ellsworth’s seniority date is changed from 2/1/08 to 11/23/07.

Chantalle Shuck’s seniority date is changed from 8/15/08 to 8/18/08.

12. The parties stipulated that due to the change in Chantalle Shuck's seniority date, it was not necessary to employ tie-breaking criteria between Ms. Shuck and Bonni Klemp-Sorber. Ms. Shuck now occupies position number 70 on the seniority list and Ms. Klemp-Sorber now occupies position number 71.

13. The District stipulated that Frances Ragle will not be laid off more than .40 FTE in the 2012-2013 school year.

### **Denise Maimone's Challenges**

14. Denise Maimone is a permanent employee with a seniority date of 8/17/09. She holds a clear single subject foundational-level math credential. Her credential entitles her to teach math in kindergarten through 12th grade and to teach math to adults. Her credential does not permit her to teach above the algebra 2 level. She currently teaches seventh and eighth grade math (pre-algebra and algebra) at Georgetown School. Ms. Maimone received a Preliminary Notice pursuant to the PKS reduction/limitation of 1.0 FTE in math. She is the least senior employee teaching math.

15. Ms. Maimone contends that she should be retained because a senior math teacher, Stacey Spencer (seniority date 8/20/01), with a supplemental authorization in math is being retained to teach high school math. Ms. Maimone maintains that her single subject credential allows her to teach a broader range of math subjects and is more valuable to the District than a supplemental authorization. Ms. Maimone does not contend that Ms. Spencer is teaching math courses for which she is not certificated.

16. Ms. Maimone's contentions are rejected. District layoff procedures are governed by Education Code sections 44949 and 44955. These sections establish a seniority-based lay off proceeding which mandates that employees shall be terminated in the inverse order in which they were employed. As long as a retained senior employee has the qualifications to render a service, that senior employee may not be displaced by a junior employee.

### **Challenges to "Skipping" of American River Charter School Teachers**

17. Tamzin Ellsworth, Scott Gilliland, Bonni Klemp-Sorber, Rhonda Phillips, Frances Ragle, Chantalle Shuck and Zady Wirth contend that the District is improperly exempting from layoff (skipping) certificated teachers at the American River Charter School (ARCS). They maintain that they should be given the opportunity to move into (bump) existing teaching positions at ARCS, or they should be moved into positions that are currently being advertised for ARCS. These respondents are unable to identify specific ARCS employees who are junior to them because the District has not assigned seniority dates to the ARCS certificated employees.

18. The District maintains that ARCS employees are not District employees, but are employees of the ARCS. Therefore, the District argues, it does not have the authority to

make assignments and reassignments to the ARCS in conformance with Education Code section 44955, subdivision (c).

19. That Superintendent provided evidence that ARCS employees are hired on a year-to-year basis, pursuant to written contracts, and they do not attain tenure or seniority with the District. ARCS employees have no rights to employment in the District or in the ARCS and they have a separate salary schedule from that of District employees. The ARCS solicits employees and makes decisions regarding whom it wishes to hire. The District Board must approve the ARCS hiring decisions and all employment contracts, because the District Board serves as the Local Education Agency (LEA). The District collects information and performs back-office services for the charter school such as payroll, billing and purchasing, and is reimbursed for these services by ARCS. The District collects the monies from the State that are allocated to the ARCS. The charter schools have a right to a portion of taxes and lottery money as well as their block grant money from the state, and the District may advance money to the charter school prior to receipt of these funds. All of the money identified for the ARCS is directed to the ARCS and none is allocated to the District.

20. The District placed in evidence the ARCS charter petition as well as its personnel policies and staff handbook. These documents comply with the requirements of Education Code section 47605, which details the petition process for establishment of charter schools. ARCS was formed pursuant to this section after a petition was filed in January 2010. Education Code section 47605 gives the governing board of the school district the power to approve a petition for establishment of a charter school. In the event of the denial, the petitioner may submit the petition to the County Board of Education and, upon denial, to the State Board of Education. There was no evidence as to which board approved the petition for the ARCS. However, the superintendent testified that the District is the LEA, and pursuant to Education Code section 47605, subdivision (k) (2), the designated LEA has all monitoring and supervisory authority over a charter agency.

21. The ACRS's charter petition addresses the governance structure of the school in Element D, at pages 8-10. Under "Structure," it states in pertinent part:

The American River Charter School shall be governed by the Board of Trustees of the Black Oak Mine Unified School District, which will serve as the charter board of the American River Charter School.... the Board of Trustees of the Black Oak Mine Unified School District has final decision-making authority over all financial, operational (including staffing), and other matters for the American River Charter School...

The American River Charter School will also have a Charter Council (ACRS Council), which will be responsible for making recommendations to the Board of Trustees. The ACRS Council will be governed by the laws established and approved annually by the council. The council will be comprised of 50% parents, students and community

members, and 50% staff of the ARCS plus one member to be designated by the Black Oak Mine Unified School District Board of Trustees...

22. In Element D, at page 11, the final paragraph states in pertinent part:

The Board of Trustees of the Black Oak Mine Unified School District is the governing body of the American River Charter School...

23. The ARCS charter petition addresses employee rights in Element L, at pages 18-19: The section states in pertinent part:

Qualities in a Charter Teacher and Charter Administrator will be sought after as delineated in the ARCS Charter School Petition. *Teachers, parents, and other stakeholders will be actively involved in the selection of these candidates.* The ARCS Charter Council is responsible for making recommendations regarding the structure of the school including the type of administration with ultimate authority resting in the BOMUSD Board of Trustees. Some options for consideration may include but not be limited to: a self governance model, contracting with the BOMUSD for technical support or a separate administrator. Should the ARCS Charter Council hire their own administrator, the Charter Administrator will solicit evaluative feedback from teachers and other key stakeholders annually to be evaluated annually by the BOMUSD... with input from the ARCS council. The BOMUSD will at all times provide oversight in regards to governance, support and technical assistance to the ARCS. The Board of Trustees of the Black Oak Mine Unified School District or its designee(s) will have final decision making over staffing matters. (Italics added)

Employees of this Charter School will participate in STRS, PERS, or Social Security depending upon each individual's eligibility. *No District employee will be required to work at the charter school (Ed. Code 47605 (3)(e).* (Italics added)

*Employee rights and terms of employment for ARCS employees will be governed by individual employment contracts and/or other ARCS policy statements, which may*

*be set forth in employee handbooks or other documents.*  
(Italics added)

24. The ARCS charter petition in Element Q, at page 22 states:

*Employer*

*The ARCS will be the exclusive public school employer responsible within the meaning and for the purpose of Education Code Section 47611.5* (Italics added)

25. The ARCS charter petition in Element S, at page 23 states in pertinent part:

Existing Black Oak Mine Unified School District employee agreements, contracts, or policies relating to school district or school district personnel may not cover American River Charter School employees. Employees covered by existing Black Oak Mine Unified School District employee agreements that transfer to American River Charter School staff, are no longer covered by Black Oak Mine Unified School District collective bargaining agreements...

26. The ACRS Personnel Policies and Staff Handbook states at page 2 section V, in pertinent part:

V. Dismissal, Discipline and Termination

...All employees will be hired on the basis of annual contracts and their terms expire at the end of the annual contract.... The Black Oak Mine Unified School District will be made aware of all Dismissals, Discipline and Terminations by the Director of the Charter School....

27. Education Code section 47610 provides:

A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts, except all of the following:

(a) As specified in Section 47611.

(b) As specified in Section 41365.

(c) All laws establishing minimum age for public school

attendance.

(d) The California Building Standards Code (Part 2 (commencing with Section 101) of Title 24 of the California Code of Regulations), as adopted and enforced by the local building enforcement agency with jurisdiction over the area in which the charter school is located.

(e) Charter school facilities shall comply with subdivision (d) by January 1, 2007.

The exceptions set forth in subdivisions (a) through (e) are not applicable here.

28. Education Code section 47611.5 provides:

(a) Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code shall apply to charter schools.

(b) A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purpose of Section 3540.1 of the Government Code. If the charter school is not so deemed a public school employer, the school district where the charter is located shall be deemed the public school employer for the purposes of Chapter 10.7 (commencing with Section 3540 of Division 4 of the Government Code).

(c) If the charter of a charter school does not specify that it shall comply with those statutes and regulations governing public school employers that establish and regulate tenure or a merit or civil service system, the scope of representation for that charter school shall also include discipline and dismissal of charter school employees.

29. Education Code section 47611, subdivision (a), provides in pertinent part:

*If a charter school chooses to make the State Teacher's Retirement Plan available, all employees of the charter school who perform creditable service shall be entitled to have that service covered under the plan's Defined Benefit Program or Cash Balance Benefit Program, and all provisions of Part 13 (commencing with Section 22000) and Part 14*



(commencing with Section 26000) shall apply in the same manner as the provisions apply to other public schools in the school district that granted the charter. (Italics added)

(b) (1) *If a charter school offers its employees coverage by the State Teachers' Retirement System or the Public Employees' Retirement System, or both, the charter school shall inform all applicants for positions within that charter school of the retirement system options for employees of the charter school.* (Italics added)

(2) The information shall specifically include whether the charter school makes available to employees coverage under the State Teachers' Retirement System, the Public Employees' Retirement System, or both systems, and that accepting employment in the charter school may exclude the applicant from further coverage in the applicant's current retirement system, depending on the retirement options offered by the charter of the charter school.

30. Education Code Section 47611.3, subdivision (a), provides in pertinent part:

At the request of a charter school, a school district or county office of education that is the chartering authority of a charter school shall create any reports required by the State Teachers' Retirement System and the Public Employees' Retirement System. The county superintendent of schools, employing agency, or school district that reports to those systems pursuant to Section 23004 of this code or Section 20221 of the Government Code shall submit the required reports on behalf of the charter school. The school district or county office of education may charge the charter school for the actual costs of the reporting services....

31. In *Wilson v. State Board of Education* (1999) 75 Cal. App. 4<sup>th</sup> 1125, the court addressed challenges to the constitutionality of the Charter School Act. In upholding the Act, the court held that the legislature determined that charter schools “would be free from most state laws pertaining uniquely to school districts.” *Id.* at 1131. The court held that charter schools are “under the jurisdiction of chartering authorities ... within the Public School System” and explained: “School districts, county boards of education and respondent Board share several things in common: The formation of each entity is provided for in article IX (§ 7 [Board and county boards of education], §§ 14 & 16 [local school districts and their governing boards]). As such each entity is “authorized to maintain” the various schools in our public school system. ( *Id.*, § 6.) Finally, each entity is a defined chartering and revoking authority under the Act (§§ 47605, subds. (b), (j), 47605.5, 47607), with

supervisory oversight over their charter schools (§§ 47604.3, 47607, 47613.7). *Wilson v. State Board of Education* 75 Cal. App. 4<sup>th</sup> 1125 at 1142.

32. Respondents contend that, because the District is the governing authority over ARCS, approves hiring and employment contracts and has certain oversight and administrative responsibilities in respect to ARCS, ARCS employees are District employees and respondents should be able to displace the less senior ARCS teachers. This argument is not persuasive. As set forth in *Wilson v. State Board of Education* (1999) 75 Cal. App. 4<sup>th</sup> 1125, the District is mandated by the Charter Schools Act to govern ARCS. As set forth in the ARCS charter petition, personnel handbook and the Education Code sections cited above, the employees of a charter school are District employees only if the charter petition elects to treat them as such. Here, the charter petition designates ARCS as the employing entity for ARCS teachers. It is abundantly clear that ARCS teachers are not automatically afforded the rights of other certificated employees. They may be selected in a different manner than District employees (i.e., parent and teacher input), the charter school may or may not elect to extend retirement benefits and tenure to employees and the charter school may set salaries and terms of employment which differ from those of District employees.

33. Respondents contend the District treated ARCS certificated employees as District employees by issuing precautionary notices of layoff to ARCS employees. As a precautionary measure, the District issued "Precautionary Notices" to ARCS teachers. The Precautionary Notices advise that the employee is to serve on a year to year basis, pursuant to the charter and the employee's contract of employment. The Precautionary Notice explains that the District layoff procedure applies only to permanent or probationary certificated employees of the District, but the Precautionary Notice was given upon "advice of counsel, because of the possibility you may believe that you are improperly categorized as a charter school teacher." The Precautionary Notice makes clear that the District does not regard ARCS employees as District employees. The District's exercise of caution in a layoff procedure does not confer a particular employment status upon a charter school employee. Respondents' argument is not persuasive.

34. Respondents contend the District treated ARCS certificated employees as District employees by including in the Resolution the skip of the Charter School. Again, this argument lacks merit. The District's exercise of caution in a layoff procedure does not confer a particular employment status upon charter school employees.

35. Respondents may apply for vacant positions at ARCS; however, they cannot be guaranteed employment at the charter school, and their layoff from the District is completely separate and unrelated to any employment possibility at the charter school.

### **Welfare of the District and Its Students**

36. The Board's decision to reduce or discontinue the particular kinds of services identified in Resolution No. No. 2012-5 was not arbitrary or capricious, but constituted a proper exercise of discretion.

37. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of the District as determined by the Board.

38. No certificated employee junior to any respondent was retained to perform any services which any respondent was certificated and competent to render.

## LEGAL CONCLUSIONS

1. Jurisdiction in this matter exists under Education Code sections 44949 and 44955. All notices and jurisdictional requirements contained in these sections were satisfied. Each respondent is presently a certificated probationary or permanent employee of the District.

2. The Board's decision to reduce or discontinue the particular kinds of services identified in Resolution No. 2012-5 was not arbitrary or capricious, but constituted a proper exercise of discretion.

3. The services identified in Resolution No. 2012-5 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. Cause exists to reduce the number of certificated employees of the District due to the reduction or discontinuance of particular kinds of services. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

4. A District may reduce services within the meaning of Education Code section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

5. Education Code section 44955, provides in pertinent part:

(a) No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Sections 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

(b) Whenever ... a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year... and when in the opinion of the governing board of the district it

shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

[¶] . . . [¶]

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof....

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed ...

... The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render....

6. As set forth in the Findings, there are no certificated employees junior to any of the respondents who are being retained to render services for which any of the respondents is certificated and competent to render.

7. The Board may give Frances Ragle final notice that .40 FTE of her services will not be required for the 2012-2013 school year.

8. The Board may give the remaining respondents final notice that their services will not be required for the 2012-2013 school year.

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## ORDER

The Accusations served on respondents are sustained. Final Notices shall be given to respondents that their services will not be required for the 2012-2013 school year because of the reduction or discontinuation of particular kinds of services. The Final Notices shall be given in inverse order of seniority.

Dated: April 29, 2012

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ANN ELIZABETH SARLI  
Administrative Law Judge  
Office of Administrative Hearings